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ARTHUR G. WHELAN, Plaintiff-Respondent v. CLEAVER-BROOKS, INC., et al. Defendants-Appellants, and A.O. SMITH CORP., et al., Defendants.	SUPREME COURT OF NEW JERSEY Docket No. 081810 CIVIL ACTION APP. DOCKET NO. A-3520-13T4 TRIAL DOCKET NO. L-7161-12 SAT BELOW: HON. CARMEN H. ALVAREZ, P.J.A.D HON. WILLIAM E. NUGENT, J.A.D. HON. HEIDI CURRIER, J.A.D.

BRIEF OF AMICUS CURIAE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF DEFENDANTS

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PRELIMINARY STATEMENT

The Appellate Division's decision sweeps so broadly that manufacturers like Defendants here will face absolute liability for any asbestos ultimately added to their products in component or replacement parts.

Plaintiff Arthur G. Whelan seeks to hold Defendants strictly liable for failing to warn him of the dangers of asbestos. The trial judge dismissed those claims, finding that Defendants need not provide safety warnings for asbestos-containing replacement parts they neither manufactured nor placed into the stream of commerce. But on appeal, the Appellate Division held "that a duty to warn exists when the manufacturer's product contains asbestos components, which are integral to the function of the product, and the manufacturer is aware that routine periodic maintenance of the product will require the replacement of those components with other asbestos-containing parts." (Pca6). The court acknowledged that Defendants did not manufacture the replacement parts but still imposed on them a duty to warn. The court based this decision on a "foreseeability" standard: a duty to warn arises when it is "foreseeable" that asbestos-containing replacement parts will be added to the initial product. (Pca36).

The Appellate Division's ruling broke from New Jersey products-liability law precluding a manufacturer's liability for

injuries caused by exposure to asbestos-containing replacement parts. Yet the court found that the manufacturer could be held responsible not only for the plaintiff's exposure to asbestos from the product as shipped, but also for later exposures to asbestos arising from replacement parts, even if those parts were supplied by third parties. So long as it is "foreseeable" that the asbestos-containing component parts would be replaced by "substantially similar" parts in the future, defendants are liable.

New Jersey has adopted a unique strict-liability regime: a defendant-manufacturer is conclusively presumed to know of the asbestos dangers associated with its products. Unlike in other jurisdictions, the defendant-manufacturer's duty to warn of dangers arises regardless of whether the manufacturer is aware of those dangers. The Appellate Division's decision expands this rule by imputing to the defendant knowledge of the dangers of third-party asbestos. WLF is concerned that this new rule, if adopted, will impose no-fault, absolute liability on any company with even the slightest connection to asbestos-containing products. The holding below also ignores another fundamental principle of New Jersey products-liability law: proof of causation requires proof that the defendant actually made the product that caused the claimed injury.

The Appellate Division's decision upends longstanding New Jersey products-liability law under which a manufacturer has a duty to warn of the dangers of only its own products. Simply put, companies are not insurers against harm from products they never manufactured or sold.

QUESTIONS PRESENTED

1. Whether a plaintiff can establish that a defendant caused his asbestos-related illness by proving exposure to asbestos in replacement parts that the defendant did not make or sell.

2. Whether a defendant has a duty to warn of the danger of asbestos in products it did not make or sell.

IDENTITY AND INTEREST OF THE AMICUS CURIAE

Founded in 1977, Washington Legal Foundation (WLF) is a nonprofit, public-interest law firm and policy center with supporters in New Jersey and all 50 States. WLF devotes much of its resources to defending and promoting free enterprise, individual rights, limited government, and the rule of law. WLF regularly appears as amicus curiae in cases involving asbestos liability. See, e.g., In re New York City Asbestos Litig., 159 A.D.3d 576 (N.Y. App. Div. 2018); In re New York City Asbestos Litig., 27 N.Y.3d 765 (2016).

Also, WLF's Legal Studies Division, the publishing arm of WLF, publishes articles on the proper scope of asbestos

liability. See, e.g., Brian J. Schneider and Laura M. Hooe, Air & Liquid Systems Corp. v. DeVries: Asbestos Litigation's "Bare Metals" Defense Goes Before the U.S. Supreme Court, WLF LEGAL BACKGROUNDER (June 22, 2018); Thomas J. LoSavio, California Appeals Court Breaks with Ninth Circuit, Accepts Government-Contractor Defense in Asbestos Liability Suit, WLF LEGAL OPINION LETTER (February 10, 2017).

WLF supports New Jersey products-liability law, which limits a manufacturer's duty to warn of asbestos dangers to only those products it actually manufactured. WLF fears that holding manufacturers strictly liable for not warning of the dangers of third-party asbestos products——as the court below did here——creates an absolute-liability regime, improperly expanding the scope of New Jersey law. WLF urges this Court to reject that absolute-liability standard.

STATEMENT OF THE CASE

Whelan, a plumber and auto mechanic, claims he developed mesothelioma due to work-related exposure to various asbestos-containing products. Defendants Armstrong International Inc., Burnham LLC, Carrier Corp., Cleaver-Brooks Inc., Crown Boiler Co., Ford Motor Co., Johnson Controls Inc., NIBCO Inc., and Oakfabco Inc. (collectively, "Defendants") contend that Whelan was not exposed regularly or frequently to asbestos in a product any of them manufactured or distributed. Whelan seeks to hold

Defendants liable based on his exposure to asbestos in replacement parts later added to products Defendants initially manufactured.

The trial court granted summary judgment to the Defendants, reasoning that New Jersey law does not require companies to warn of the dangers of asbestos-containing replacement parts they neither manufactured nor placed into the stream of commerce. The Appellate Division reversed and remanded the claims for trial. This Court agreed to review that decision.

The Appellate Division explained that, for purposes of a strict-liability claim, a product is "defective" if, absent a warning of potential dangers, the product is not reasonably fit, suitable, or safe for its intended uses. (Pca27). Disagreeing with a prior panel decision in Hughes v. A.W. Chesterton Co., 435 N.J. Super. 326 (App. Div. 2014), the court held that the relevant "product" for purposes of the warning requirement is "the complete manufactured item as delivered by the manufacturer to the consumer"——even if the dangerous material that ultimately injured the plaintiff is contained in a replacement part that the defendant did not make or sell. (Pca34).

The court concluded that a manufacturer's failure-to-warn liability turns heavily on its knowledge at the time of sale of how its product is likely to be used:

> [W]e conclude that a manufacturer will have a duty to warn in strict liability if a plaintiff can show: 1) the manufacturer's product as marketed to the end user contained asbestos-containing components; 2) the asbestos-containing components were integral to the function of the product; and 3) the manufacturer was reasonably aware its product would require periodic and routine maintenance involving the replacement of the asbestos-containing component parts with other asbestos-containing component parts.

(Pca36-37).

Applying its new standard, the Appellate Division held that Whelan's causation evidence withstood Defendants' summary-judgment motion, so he could bring his failure-to-warn claim to trial. (Pca47-50).

ARGUMENT

I. UNDER NEW JERSEY LAW, THE DUTY TO WARN OF ASBESTOS DANGERS EXTENDS TO ONLY THOSE WHO MAKE OR SELL THE PRODUCTS THAT CONTAIN THE ASBESTOS THAT ALLEGEDLY CAUSED INJURY.

As the Appellate Division acknowledged, other jurisdictions are sharply divided over whether a manufacturer's duty to warn of asbestos-exposure extends to those who are exposed to asbestos in replacement parts that the defendant did not make or sell. (Pca38). What the court failed to acknowledge, however, is that in none of those other jurisdictions did the issue arise in the context of New Jersey's unique approach to asbestos strict-liability litigation. New Jersey determines the existence of a duty to warn based on objective criteria that do not take into account the manufacturer's knowledge at the time of sale.

Indeed, New Jersey imposes on manufacturers a duty to warn of asbestos dangers even if limits on scientific knowledge at the time of sale mean that the manufacturers could not possibly have been aware of those dangers.

The considerations that led some courts in other jurisdictions to hold manufacturers potentially liable for asbestos injuries caused by third-party replacements parts are wholly out of place under New Jersey's strict-liability regime. None of those courts permits failure-to-warn liability unless the plaintiff can demonstrate that at the time of sale the manufacturer knew both that asbestos-containing replacement parts were likely to be added to its product and that the asbestos was dangerous to users. See, e.g., Air & Liquid Systems Corp. v. Devries, 586 U.S. ___, 2019 WL 1245520 (2019).

New Jersey has adopted a different approach, one that assigns the duty to warn to the entity or entities best positioned to minimize the costs of accidents, regardless of knowledge or fault. That entity, in the case of replacement parts containing asbestos, is the company that manufactured or distributed the replacement part. By attempting to expand the duty to warn to encompass companies that may have been aware that others might provide replacement parts, the decision below re-introduces knowledge-based factors that this Court has

rejected, adding unwarranted complications to asbestos-liability litigation.

A. New Jersey's Longstanding Asbestos-Liability Rule Imposes a Duty to Warn Regardless of a Manufacturer's Knowledge or Fault.

To prevail on a strict-liability claim in New Jersey, a plaintiff must prove "that the product was defective, that the defect existed when the product left the defendant's control, and that the defect caused injury to a reasonably foreseeable user." Zaza v. Marquess & Nell, Inc., 144 N.J. 34, 49 (1996) (quoting Feldman v. Lederle Labs., 97 N.J. 429, 479 (1984)). A product is defective if "it is not reasonably fit, suitable, and safe for its intended or reasonably foreseeable purposes." Suter v. San Angelo Foundry & Machine Co., 81 N.J. 150, 169 (1979).

One test for determining whether a product is safe is whether the risk of injury has been reduced to the greatest extent possible consistent with the product's utility. Freund v. Cellofilm Properties, Inc., 87 N.J. 229, 238 n.1 (1981). Under that test, a product is unsafe (regardless of utility) if it lacks a warning that would have made the product safer and could have been added without cost and without limiting the product's utility. Beshada v. Johns-Manville Products Corp., 90 N.J. 191, 202 (1982).

Outside the context of asbestos cases, this Court permits litigants to defend against failure-to-warn claims by showing

that they could not have provided a warning because later-discovered dangers were unknowable at the time of sale. Feldman, 97 N.J. at 454-55. But New Jersey expressly rejects a state-of-the-art defense in asbestos cases, explaining:

> [S]tate-of-the-art is a negligence defense. It seeks to explain why defendants are not culpable for failing to provide a warning.… But in strict liability cases, culpability is irrelevant. The product was unsafe. That it was unsafe because of the state of technology does not change the fact that it was unsafe. Strict liability focuses on the product, not the fault of the manufacturer.

Beshada, 90 N.J. at 204.

Beshada's manufacturer-knowledge-is-irrelevant holding is fully consistent with "the goals and policies sought to be achieved by our strict liability rules." Id. at 205. Those rules impose strict liability on the manufacturers and distributors of an inadequately labeled asbestos product for many reasons, including that they can "best allocate the costs of the injuries resulting from" the product's use. They can include the costs of potential injuries in the product's price, ensuring that "the costs of the product will be borne by those who profit from it: the manufacturers and distributors who profit from its sale and the buyers who profit from its use." Ibid.

These strict-liability rules also "minimize the costs of accidents." Id. at 206 (quoting Suter, 81 N.J. at 173). A major objective of those rules is to impose liability (regardless of

fault) on "the cheapest cost avoider"——the party best positioned to determine the most efficient and cost-effective accident—— avoidance measures. Ibid.

Another goal of New Jersey's strict-liability rules is to "simplify the law." Id. at 208 (quoting Keeton, Products Liability——Inadequacy of Information, 48 Tex.L.Rev. 398, 409 (1970)). Permitting a state-of-the-art defense would create "great difficulties" in asbestos-liability trials, as it would require deciding whether manufacturers should have foreseen product dangers. It would also require examining "whether defendants' investment in safety research in the years preceding distribution of the product was adequate." Ibid.

B. The Decision Below Conflicts with This Court's Goals and Policies Underlying Strict Liability.

The decision below greatly expands manufacturers' duty to warn in asbestos cases. Its holdings——that a manufacturer has a duty to warn of the danger of asbestos in products it did not make or sell, and that an asbestos plaintiff can establish causation by proving exposure to asbestos in third-party replacement parts——are unprecedented in New Jersey.

More importantly, the Appellate Division's decision flouts this Court's case law. Beshada holds that a manufacturer's knowledge of risks plays no role in determining failure-to-warn strict-products liability. Even so, the court below held that a

manufacturer can be held liable for injuries caused by asbestos in third-party replacement parts if the plaintiff proves that "the manufacturer was reasonably aware its product would require periodic and routine maintenance involving the replacement of the asbestos-containing component parts with other asbestos-containing component parts." (Pca36-37).

This dramatic expansion of manufacturers' duty to warn serves none of the goals and policies of New Jersey's strict-liability regime. See Beshada, 90 N.J. at 204-08. Imposing liability on a manufacturer that neither made nor sold the asbestos-containing replacement part does not "best allocate the costs of the injuries resulting from" the product's use. Id. at 205. On the contrary, the "best" allocation is imposition of liability on the manufacturers or suppliers of the asbestos-containing parts. Imposing liability on those entities ensures that a product's costs are borne by those who profit from its sale and use. Ibid. Allocation of those costs to Defendants does not serve the goals of strict liability, because Defendants did not profit from the sale of those parts and so are in no position to spread the costs by raising replacement-part prices.

Nor does allocating those costs to Defendants "minimize the costs of accidents" by imposing liability on "the cheapest cost avoider"——the party best positioned to decide the most efficient expenditures for accident-avoidance measures. Beshada, 90 N.J.

at 206. The "cheapest cost avoiders" under these circumstances are the manufacturers or suppliers of the replacement parts; they can most easily provide safety warnings by attaching them to the packaging of Whelan's replacement parts and those procured by similarly situated users. In contrast, Defendants have few means of ensuring that any safety warnings they provide at the time of sale will even be seen when, years later, users like Whelan come into contact with replacement parts containing asbestos that have been added to their products.

That Defendants are not the "cheapest cost avoiders" is well illustrated by Whelan's hobby of restoring antique Ford vehicles manufactured between 1932 and 1953. His restoration work, performed decades after Ford sold the vehicles to their original owners, exposed him to asbestos-containing replacement parts unconnected to Ford. Any safety warning Ford might have placed on its vehicles likely would have been included in owners' manuals. But Whelan never alleged that he possessed such a manual——and the likelihood that antique cars are sold with their original owners' manuals is extremely remote. In contrast, the manufacturers of the replacement parts Whelan purchased for the antique Fords would have had little difficulty attaching health warnings to their parts.

The decision below also cuts against a major goal of strict-liability: simplifying products-liability litigation.

That was a major reason why this Court rejected the state-of-the-art defense in asbestos litigation. Beshada, 90 N.J. at 208. Rejecting that defense eliminated the need for lengthy trials over what manufacturers knew and when they knew it. But the decision below reintroduces the need to examine such evidence, by requiring a jury to decide whether a manufacturer knew: (1) its products would require periodic and routine maintenance involving the replacement of asbestos-containing parts; and (2) the replacement parts would also contain asbestos. (Pca36-37).

Defendants facing asbestos claims under the Appellate Division's new rule no doubt will vigorously contest such knowledge, particularly given that use of asbestos was long ago phased out in the replacement parts at issue here. The avalanche of asbestos lawsuits can best be administered by sticking with the current rule: strict liability is imposed only on the manufacturer or supplier that introduced the asbestos to which the plaintiff was exposed, and the original manufacturer's knowledge has no bearing on the liability issue.

In support of its third-party liability standard, the Appellate Division relied on decisions from other jurisdictions. (Pca38-39) (citing, among others, In re New York City Asbestos Litig., 27 N.Y.3d 765, 788 (2016) ("Dummitt"); May v. Air & Liquid Sys. Corp., 446 Md. 1 (2015)). But each of those decisions arose in jurisdictions that (unlike New Jersey)

recognize the state-of-the-art defense. See, e.g., Smith v. Sears, Roebuck & Co., 824 N.Y.S.2d 547, 548 (N.Y. App. Div. 2006); Owens-Illinois, Inc. v. Zenobia, 325 Md. 420, 437 (1992) (holding state-of-the-art evidence is relevant in asbestos failure-to-warn cases). Thus, each of those jurisdictions (unlike New Jersey) already authorizes trials based on the defendant's knowledge and absolves a defendant of any duty to warn of asbestos's dangers if it had no reason to know of those dangers at the time of sale.

New Jersey adopted a much different approach: to ensure an efficient litigation system that incentivizes improving safety and spreading costs, it imposed no-fault liability on a very specific group of manufacturers. There is no reason to go back on that "bargain" simply because Whelan wants to sue companies with deeper pockets than the ones who supplied the asbestos to which he was exposed.

II. EXPANDING THE DUTY TO WARN TO COVER THIRD-PARTY ASBESTOS WOULD LEAD TO ABSOLUTE LIABILITY FOR MANUFACTURERS.

New Jersey products-liability law has consistently confined liability for a defective product to the manufacturer or supplier responsible for creating or supplying that product. Zaza, 144 N.J. at 49. The decision below, by imposing a duty to warn on third parties, undercuts that longstanding rule and threatens to impose what is, in effect, absolute liability. In

its zeal to find deep pockets capable of compensating Whelan for his serious illness, the court crafted a rule with no logical stopping point. Indeed, it can be modified as needed to impose no-fault liability on any company with even the slightest connection to asbestos-containing products.

But New Jersey has long rejected that outcome in similar products-liability cases. "Simply because a plaintiff is not required to prove fault in a strict-liability case does not mean that absolute liability will be imposed upon a manufacturer. Although a plaintiff is relieved of proving fault, the plaintiff must nonetheless prove that the [defendant's] product was defective." Myrlak v. Port Auth. of New York & New Jersey, 157 N.J. 84, 97 (1999).

Whelan alleges that Defendants' products were "defective" when sold because they contained asbestos but failed to warn of the dangers of asbestos. But any such defect is irrelevant to Whelan's claims; he never was exposed to Defendants' asbestos on the requisite "regular or frequent basis." See James v. Bessemer Processing Co., 155 N.J. 279, 304 (1998).

If Defendants can be held liable on a no-fault basis for Whelan's injuries caused by third-parties' asbestos-containing replacement parts, then there is no logical reason to prevent imposing no-fault liability on any other company that has ever produced asbestos. For example, one could just as well argue

that liability should be imposed on the company that first discovered (and recommended) the benefits of asbestos for insulation in gaskets, because Whelan might never have been exposed to asbestos but for that discovery.

Imposing absolute liability on manufacturers for asbestos they neither made nor sold is far more devastating in New Jersey than in the other jurisdictions. As shown above, Freund and Beshada make clear that manufacturers' knowledge is irrelevant in strict liability; a defendant in New Jersey may not rely on a defense of "unknowability" in contesting claims that it failed to warn about asbestos dangers. If this Court finds that manufacturers must warn of dangers associated with third-party replacement parts, it will effectively presume the manufacturer knew of any dangers related to third-party products, and the defendant would be unable to argue otherwise.

That approach contrasts sharply with other jurisdictions that have adopted third-party warning requirements. For example, the U.S. Supreme Court recently held that, in the maritime-tort context, in light of the "special solicitude" that the law extends to seamen, "a product manufacturer has a duty to warn when (i) its product requires incorporation of a part, (ii) the manufacturer knows or has reason to know that the integrated product is likely to be dangerous for its intended uses; and (iii) the manufacturer has no reason to believe that the

product's users will realize that danger." Air & Liquid Systems, 2019 WL 11245520, slip op. at 9-10. By requiring a plaintiff to prove that the manufacturer "knows or has reason to know" of the product's dangerousness at the time of sale, the Court expressly disavowed the no-fault, unlimited-liability standard adopted here by the Appellate Division.

The Appellate Division's citation to New York law is similarly inapt. The New York Court of Appeals, in adopting a rule similar to Air & Liquid Systems, expressly noted that other jurisdictions impose strict liability without fault. As a result, those jurisdictions typically "place stricter limits on the existence and scope of the duty to warn to avoid the injustice of widespread application of true strict liability in the failure-to-warn context." Dummitt, 27 N.Y.3d at 798. But New Jersey law contains no such limits; it does not recognize the state-of-the-art defense in asbestos cases. And the decision below greatly expands the scope of the duty to warn. Without those defenses available elsewhere, the Court should overturn the decision below to avoid exposing manufacturers to absolute, unlimited liability.

III. EXPANDING THE DUTY TO WARN TO COVER THIRD-PARTY ASBESTOS CORRODES NEW JERSEY'S CAUSATION STANDARD.

To establish a products-liability claim, a plaintiff first must demonstrate that the product was defective when it left the

manufacturer's control. Coffman v. Keene Corp., 133 N.J. 581, 594 (1993). It then must "demonstrate medical causation by establishing: (1) factual proof of the plaintiff's frequent, regular and proximate exposure to a defendant's products; and (2) medical and/or scientific proof of a nexus between the exposure and the plaintiff's condition." James 155 N.J. at 304 (1998) (adopting the test from Sholtis v. American Cyanamid Co., 238 N.J. Super. 8 (App. Div. 1989)). That standard should end this case. Whelan did not suffer "frequent, regular and proximate exposure to the defendant's products"——virtually all of the asbestos to which he was exposed did not come from Defendants but from replacement parts made by other companies.

But the Appellate Division circumvented this Court's long-standing medical-causation standard. Specifically, it altered the definition of "product." Rather than a "product" being the component that actually contained asbestos, the court defined "product" as the full mechanism placed into the marketplace by the original manufacturer. (Pca34).

That decision directly conflicts with Hughes, an earlier Appellate Division asbestos-liability decision. Hughes holds that the relevant "product" for causation purposes is any material actually supplied by the manufacturer, but that does not include replacement parts that the manufacturer never made nor sold. 435 N.J. Super. at 345-46. The plaintiff must

demonstrate that his injuries were caused by exposure to the "specific products manufactured or sold by the defendant." Id. at 345. Failing to warn of materials to which the plaintiff was never exposed cannot logically cause a plaintiff's injury.

The Appellate Division explicitly "part[ed] ways and disagree[d] with [its] colleagues in Hughes." (Pca33). The court determined that a manufacturer's failure to warn of the dangers of its product can be deemed to have caused a plaintiff's injury, even if the product undergoes substantial alterations. Ibid. "[I]f the defect which, singly or in combination, caused the injury existed before, as well as after, the change, the manufacturer is not relieved of liability, regardless of how much the product has been changed." (Pca33-34) (citing Michalko v. Cooke Color & Chem. Corp., 91 N.J. 386, 400 (1982)).

But this holding eviscerates the "fundamental principle of products-liability law that a plaintiff must prove, as an essential element of his case, that the defendant manufacturer actually made the particular product which caused injury." Namm v. Charles E. Frost & Co., 178 N.J. Super. 19, 27 (App. Div. 1981) (citing Scanlon v. Gen. Motors Corp., 65 N.J. 582, 590 (1974) (other citations omitted)). Here, the defect that "caused" Whelan's injury did not exist until the replacement parts were added to Defendants' products, regardless of whether those products may have been defective when first sold.

If the "product" for which a manufacturer can be held liable includes later-added component and replacement parts the defendant did not even make, then there is virtually no limit to a manufacturer's potential liability. Again, New Jersey law conclusively presumes that manufacturers know of the dangers inherent in their own product. But by significantly expanding the definition of what constitutes a manufacturer's "own product," the Appellate Division creates a new, far-broader presumption: that manufacturers also know of the dangers of any third-party product that, following the initial sale, is added to the original product. But New Jersey law follows a more stringent causation standard that requires that liability be imposed only on "those defendants to whose products the plaintiff can demonstrate he or she was intensely exposed." James, 155 N.J. at 302-03. As Whelan cannot demonstrate he was "intensely exposed" to products the Defendants actually manufactured, he cannot demonstrate that Defendants caused his injury.

CONCLUSION

For all these reasons, amicus curiae Washington Legal Foundation urges the Court to reverse the judgment below.

Date: April 3, 2019

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